Supreme Court, U.S.
FILED
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09-670

No.

In The

# Supreme Court of the United States

—♦—

*In re*

LOCAL # 46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,

*Petitioners,*

– against –

UNITED STATES OF AMERICA; CHARLES DOHERTY; HON. JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK; HON. DENNIS JACOBS, CHESTER STRAUB, PETER HALL AND REMAINING JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITIONERS' REPLY BRIEF

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT ..... 1

REPLY ARGUMENT

I. THE COURT SHOULD HEAR THIS CASE TO DETERMINE ITS OWN JURISDICTION TO REVIEW CVRA MANDAMUS DENIALS IN THE COURTS OF APPEALS ..... 1

II. THE COURT SHOULD HEAR THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER RESTITUTION IN CONSPIRACY CASES IS LIMITED TO HARM CAUSED BY THE OFFENSE OF CONVICTION, OR EXTENDS MORE BROADLY TO RELATED UNCHARGED CONDUCT BY THE DEFENDANT ..... 8

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

Cases: Page(s)

*Automobile Workers v. Scofield*, 382 U.S. 205 (1965) . . . . . 2, 7

*Devlin v. Scardelletti*, 536 U.S. 1 (2002) . . . . . 7

*Hohn v. U.S.*, 524 U.S. 236 (1998) . . . . . 2

*Hughey v. U.S.*, 495 U.S. 411 (1990) . . . . . 8, 11

*In re Antrobus*, 563 F.3d 1092 (10th Cir. 2009) . . 2, 7

*In re Antrobus*, 519 F.3d 1123 (10th Cir 2008) . . . . . 5

*In re Local #46*, 568 F.3d 81 (2d Cir. 2009) . . . . . 9-11, 13

*Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011 (9th Cir. 2006) . . . . . 5

*La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) . . . . . 2

*U.S. v. Akande*, 200 F.3d 136 (3d Cir. 1999) . . 11, 12

*U.S. v. Bach*, 172 F.3d 520 (7th Cir. 1999) . . . . . 4

*U.S. v. Balentine*, 569 F.3d 801 (8th Cir.), *cert. pending*, No. 09-6760 (filed Sept. 28, 2009) . . . . . .4, 6

*U.S. v. Bogart*, 576 F.3d 565 (6th Cir. 2009) ..... 4

*U.S. v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007) ..... 9, 12

*U.S. v. Dando*, 287 F.3d 1007 (10th Cir. 2002) ..... 5

*U.S. v. Dickerson*, 370 F.3d 1330 (11th Cir. 2004) ..... 10

*U.S. v. Dolan*, 571 F.3d 1022 (10th Cir. 2009), *cert. granted*, 2010 WL 46509 (Jan. 8, 2010) .... 4, 5

*U.S. v. Elson*, 577 F.3d 713 (6th Cir. 2009) ..... 11

*U.S. ex rel. Eisenstein v. N.Y.C.*, 129 S. Ct. 2230 (2009) ..... 8

*U.S. v. George*, 403 F.3d 470 (7th Cir. 2005) .... 4, 11

*U.S. v. Henoud*, 81 F.3d 484 (4th Cir. 1996) ..... 11

*U.S. v. Hensley*, 91 F.3d 274 (1st Cir. 1996) ..... 11

*U.S. v. Holthaus*, 486 F.3d 451 (8th Cir. 2007) .... 10

*U.S. v. Hughey*, 147 F.3d 423 (5th Cir. 1998) .. 11, 12

*U.S. v. Hunter*, 548 F.3d 1308 (10th Cir. 2008) .... 7

*U.S. v. MacPherson*, 2009 WL 5125488 (2d Cir. Dec. 30, 2009) ..... 12

*U.S. v. Marks*, 530 F.3d 799 (9th Cir. 2008) ..... 5

*U.S. v. Johnson*, 378 F.3d 230 (2d Cir. 2004) ..... 14

*U.S. v. Ramirez*, 196 F.3d 895 (8th Cir. 1999) .... 10

*U.S. v. Scat, Inc.*, 40 Fed. Appx. 310 (8th Cir. 2002) ..... 10

*U.S. v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005) ..... 6

*U.S. v. Zakhary*, 357 F.3d 186 (2d Cir. 2004) ..... 5

**Statutes and Rules:**

18 U.S.C. § 3663 ..... 8

18 U.S.C. § 3663A ..... 8, 10

18 U.S.C. § 3663A(2) ..... 13

18 U.S.C. § 3664(d)(5) ..... 4

18 U S C. § 3771(a)(7) ..... 6

18 U.S.C. § 3771(d)(5) ..... 5

28 U.S.C. § 2244(b)(3)(E) ..... 3

28 U.S.C. § 2254(1) ..... 7

31 U.S.C. § 3729 ..... 8

## STATEMENT

Petitioners (collectively, the "Union") decline respondent Charles Doherty's premature invitation to extensively debate the facts or the merits of the questions presented. We write chiefly to reiterate the questions' cert-worthiness, which Doherty's 32-page opposition ("Opp.") confirms by sheer length alone.

## REPLY ARGUMENT

### I. THE COURT SHOULD HEAR THIS CASE TO DETERMINE ITS OWN JURISDICTION TO REVIEW CVRA MANDAMUS DENIALS IN THE COURTS OF APPEALS

The Union's first question presented asks whether this Court has "jurisdiction" to "review circuit court denials of [victim] mandamus petitions under the CVRA." Pet. i. Doherty does not dispute, and thereby tacitly concedes, the crux of the Union's argument on this point:

- This Court's authority to review CVRA mandamus denials is an open and unsettled question.

- With the advent of the CVRA and MVRA, victims and victim rights play increasingly prominent roles in federal criminal proceedings.

- This increased prominence makes the jurisdictional question exceptionally novel and important.

- The question will endlessly repeat yet evade review unless this Court steps in to resolve it, as the Court alone has jurisdiction to determine its own jurisdiction.

Rather than confront these stark institutional concerns – reason enough to hear this case – Doherty contests the Court's jurisdiction on the merits. That puts the cart before the proverbial horse and only underscores the need for this Court's intervention. Even so, Doherty's substantive argument fails on its own terms.

As this Court has long recognized, certiorari jurisdiction generally lies for "a 'party' to a case in the Court of Appeals," *Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965), and a "case" in this context means any "'proceeding in court,'" *Hohn v. U.S.*, 524 U.S. 236, 241 (1998). Since the mandamus petition was a "case" in the Court of Appeals to which the Union was a named "party," this Court's jurisdiction would seem assured. *Cf. In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009) (assuming certiorari jurisdiction to review CVRA mandamus denials in circuit courts); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (exercising certiorari jurisdiction to review mandamus grant).

Trying to avoid this straightforward conclusion, Doherty offers several unpersuasive responses.

*First*, he notes that the CVRA's "plain language" confers a "mandamus remedy with the circuit court," but no right to "further relief." Opp. 2, 10. Yet that merely restates the obvious and begs the question presented. *See id.* 11 ("The [Union] acknowledge[s] that the CVRA does not expressly grant alleged victims the right to seek review of a denial of a petition for ... mandamus") (citing Pet. 8). Doherty cannot defeat the Union's petition by resorting to undisputed truisms.

Nor does the statute's silence on this score divest the Court of jurisdiction by negative implication. *See* Opp. 9-14, 18. Nothing in the CVRA purports to override the background presumption favoring certiorari jurisdiction, and Congress knows how to do so when it wants to. *Cf.* 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive [habeas] application ... shall not be the subject of a petition ... for a writ of certiorari.").

*Second*, Doherty claims that certiorari review would frustrate the CVRA's "short" deadlines for filing and deciding mandamus petitions, delaying "finality in sentencing." Opp. i, 2, 9, 12-14 & n.2, 17-18. This argument is multiply flawed:

A. Contrary to Doherty's implicit assumption, a restitution hearing is not part of the sentencing

process at all, but "a summary proceeding ancillary to a criminal prosecution" that aids "tort victim[s]" in "recover[ing their] damages." *U.S. v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (Posner, C.J.). And since restitution isn't part of sentencing, another level of judicial review cannot possibly affect sentencing finality in the circumstances at hand. *See U.S. v. George*, 403 F.3d 470, 473 (7th Cir. 2005) (restitution "not a criminal punishment" but a "civil remedy administered for convenience by courts that have entered criminal convictions") (Easterbrook, J.).

B. Consistent with restitution's non-criminal nature, the MVRA expressly contemplates bifurcation of restitution and sentencing proceedings. In particular, 18 U.S.C. § 3664(d)(5) allows judges to defer restitution determinations until "90 days after sentencing," and up to 150 days under certain conditions. And even those limits are "non-jurisdictional,"[1] as appellate courts routinely uphold restitution orders entered "months" and "years" after sentencing. *Dolan*, 571 F.3d at 1026 (roughly nine months); *accord U.S. v. Balentine*, 569 F.3d 801, 802 (8th Cir.) (over two years), *cert. pending*, No. 09-6760 (filed Sept. 28, 2009).

As this discussion demonstrates, the statutory scheme already anticipates the issuance of post-

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[1] *U.S. v. Dolan*, 571 F.3d 1022, 1030 (10th Cir. 2009), *cert. granted*, 2010 WL 46509 (Jan. 8, 2010); *accord U.S. v. Bogart*, 576 F.3d 565, 571 (6th Cir. 2009).

sentencing restitution awards. Moreover, even long delays in calculating restitution do not constrain judges from sentencing in the interim and imposing restitution much later. In these circumstances, any claim that certiorari review will somehow impair sentencing finality is fanciful. *Contra U.S. v. Zakhary*, 357 F.3d 186, 191 (2d Cir. 2004) (MVRA time limits *not* meant to "establish finality" or prevent "drawn-out sentencing proceedings"). This is especially true because another CVRA provision, 18 U.S.C. § 3771(d)(5), allows victim motions to reopen sentences in specified situations, further negating any expectation of finality. Indeed, this Court recently granted certiorari to address a closely related question – may district courts enter restitution orders beyond the MVRA's time limits? – making this case an ideal companion. *See Dolan v. U.S.*, No. 09-367, cert. pet. i (Sept. 23, 2009).

C. Most fundamentally, Doherty's position turns the law on its figurative head, as the MVRA's time restrictions are "designed to protect *victims*, *not* defendants," *U.S. v. Marks*, 530 F.3d 799, 812 (9th Cir. 2008), by thwarting asset "dissipation." *U.S. v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir. 2002); *see Dolan*, 571 F.3d at 1029 ("need for speed and finality arises out of concern for *victims*, *not* victimizers"). Similar concerns motivate the complementary time frames in the CVRA. *See Antrobus*, 519 F.3d at 1129-30 (CVRA mandamus deadlines "afford litigants considerably more rights than they would otherwise have"); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1018 (9th Cir. 2006) (apologizing to victim for noncompliance with three-day decision rule);

18 U.S.C. § 3771(a)(7) (granting *victim* right to "proceedings free from unreasonable delay").

It would be anomalous if Doherty, a convicted money launderer, could evade certiorari in this case by invoking a series of victim-friendly time constraints. Such an undeserved "windfall" would "defeat the statutory purpose" and add insult to injury, twice rewarding the wrongdoer "at the expense of those already once" wronged. *Balentine*, 569 F.3d at 804, 807.

*Third*, Doherty seeks to consign unsuccessful mandamus petitioners to direct government appeals on their behalf in the underlying criminal prosecution. Opp. 1-2, 9, 11. Doherty's position is internally inconsistent. If victim certiorari petitions supposedly impair sentencing finality, then what of post-judgment appeals by the government? After all, they not only prolong the resolution of criminal litigation but threaten to unwind the whole sentencing package well after the fact. Doherty cannot have it both ways.

More elementally, though, Doherty's position proves too much. For it would leave victims aggrieved by circuit court mandamus denials solely to the government's good offices, which may or may not be exercised. And that, in turn, would subvert the CVRA's goals of victim empowerment and *expanded* appellate recourse – *viz.*, "direct standing" to "vindicate their

[own] rights *independent* of prosecutors." *U.S. v. Turner*, 367 F. Supp. 2d 319, 324, 336 (E.D.N.Y. 2005).[2]

*Fourth*, and finally, Doherty disputes the Union's status as a "party" within the meaning of 28 U.S.C. § 1254(1). Opp. i-ii, 14-16. This argument is purely semantical. Beyond the Union's undeniable "party" status in the Court of Appeals under *Scofield* – a case Doherty studiously ignores – this Court has traditionally construed the term in practical, common sense fashion.[3] And more pointedly, the CVRA itself strives to make victims "independent participants in the ... justice process," with their own "seat at the table." *Antrobus*, 563 F.3d at 1101. There is no principled distinction between a "party," on the one hand, and an "independent participant[]" with its own "seat at the table" on the other.

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[2] Doherty's heavy reliance on *U.S. v. Hunter*, 548 F.3d 1308 (10th Cir. 2008), is entirely misplaced. *See* Opp. 12-13, 15-18. There, twice rebuffed mandamus petitioners tried to bypass certiorari review – which the Tenth Circuit assumed available later in the same case, *see Antrobus*, 563 F.3d at 1097 – by pursuing a direct, post-judgment appeal of the defendant's sentence in the underlying criminal prosecution. Here, by contrast, the Union has proceeded exactly as the Tenth Circuit recommended, seeking a writ of certiorari from this Court following the Second Circuit's denial of mandamus relief.

[3] *See* Pet. 9 n.2; *Devlin v. Scardelletti*, 536 U.S. 1, 7-8, 10 (2002).

*U.S. ex rel. Eisenstein v. N.Y.C.*, 129 S. Ct. 2230 (2009), cited at Opp. 14, embraces and extends this pragmatic approach, fully supporting the Union's position. The United States, having expressly declined to intervene, was merely a nominal party to the private qui tam action in that case, brought under the False Claims Act, 31 U.S.C. § 3729. Here, in contrast, the Union *did* functionally intervene in district court, vigorously litigating its right to restitution and an ensuing mandamus petition on its own behalf.

## II. THE COURT SHOULD HEAR THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER RESTITUTION IN CONSPIRACY CASES IS LIMITED TO HARM CAUSED BY THE OFFENSE OF CONVICTION, OR EXTENDS MORE BROADLY TO RELATED UNCHARGED CONDUCT BY THE DEFENDANT

The Union's second question presented asks whether the amended definition of "victim" in the VWPA (18 U.S.C. § 3663) and MVRA (*id.* § 3663A) abrogates *Hughey v. U.S.*, 495 U.S. 411 (1990), in conspiracy cases by extending restitution to "acts of related conduct for which the defendant was not convicted," as distinct from conduct forming an element of the offense of conviction. Pet. ii. Doherty concedes that the circuits disagree over how to construe the term "victim" in restitution cases involving conspiracies. Opp. 3, 21. But he tries to reduce the dispute to minor squabbles about whether putative victims must be

named in the charging instrument or plea agreement to qualify for restitution, and whether the "operative events" must occur within the "statute of limitations." *Id.* 3, 22, 30. Doherty's effort to downplay the conflict's magnitude is unavailing, reading the relevant cases too literally and narrowly.

*U.S. v. Brock-Davis*, 504 F.3d 991 (9th Cir. 2007), illustrates the point. The defendant there was accused and convicted of a discrete conspiracy to manufacture methamphetamine "on a specific date ... at a specific location,"[4] on Oct. 18, 2005 in Missoula, Montana. *Id.* at 994, 998. Yet the Ninth Circuit upheld a restitution order based on the defendant's role in an uncharged conspiracy to manufacture methamphetamine "on a different date ... in a different [place],"[5] Kalispell, Montana. *Id.* at 994-95, 998. The Court reasoned that the "expansive" victim definition in the amended VWPA and MVRA had "overrule[d]" *Hughey* in conspiracy cases, allowing restitution for "acts of related conduct" committed by the defendant "*even beyond the counts of conviction.*" *Id.* at 998-99.[6]

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[4] *In re Local #46*, 568 F.3d 81, 87 n.3 (2d Cir. 2009) (opinion below).

[5] *Ibid.*

[6] The Second Circuit's opinion below, quoted at Opp. 22-23, is written to minimize the appearance of conflict and cannot be harmonized with *Brock-Davis*. The Second Circuit deemed the decisions consistent to the extent that the uncharged Kalispell (continued...)

At least four other circuits concur in this conclusion. *See, e.g., U.S. v. Holthaus*, 486 F.3d 451, 458 n.6 (8th Cir. 2007) (amendments authorize restitution for "'every victim harmed in the course of the defendant's conspiracy ..., not just the offense of conviction'") (quoting *U.S. v. Scat, Inc.*, 40 Fed. Appx. 310, 311 (8th Cir. 2002))[7]; *U.S. v. Dickerson*, 370 F.3d 1330, 1334-36 & n.8, 1338-43 (11th Cir. 2004) (amendments require restitution "for all losses resulting" from "relevant conduct" or "common scheme"

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[6](...continued)
episode in *Brock-Davis* was part of the same "'pattern of criminal activity'" as the Missoula offense of conviction. 568 F.3d at 87 n.3. But Brock-Davis was charged with a methamphetamine *conspiracy, not* a methamphetamine *pattern*. And by its terms, MVRA § 3663(A)(2) authorizes restitution for harm inflicted in the course of "*the* scheme, conspiracy, or pattern," but *only* where the offense involves a scheme, conspiracy or pattern "as an *element*." Therefore, because Brock-Davis's methamphetamine conspiracy offense had *no* pattern "element" – and because the Kalispell episode was outside the scope of the narrow Missoula conspiracy charged in the indictment – the Ninth Circuit necessarily went beyond the elements of the offense of conviction in awarding restitution for the Kalispell episode. Yet the opinion below unequivocally rejected that approach, expressly limiting restitution to harm caused by the conspiracy element of the offense of conviction itself. It follows that the decisions are flatly contradictory, notwithstanding the Second Circuit's effort to reconcile them.

[7] Since *Holthaus* relied on an intervening Eighth Circuit decision, Doherty's observation (Opp. 24-26) that it "did not address, or purport to change," an "earlier" ruling from the same Court, *U.S. v. Ramirez*, 196 F.3d 895 (8th Cir. 1999), is inscrutable.

closely "related" to charged conspiracy)[8]; *U.S. v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) (amendments allow restitution in conspiracy cases whether or not defendant's harmful conduct is "charged in the indictment"); *U.S. v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996) (amendments extend restitutionary authority to conduct "closely related" to charged conspiracy, whether or not defendant "convicted for each criminal act" within its scope).[9]

In contrast, at least four other courts of appeals – including the Second Circuit in this case – take the opposite view, asserting that *Hughey* continues to "'exclude injuries caused by offenses that are not part of the conspiracy of which the defendant has been convicted.'" *U.S. v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009) (quoting *George*, 403 F.3d at 474); *accord Local # 46*, 568 F.3d at 87 (touchstone "remains the 'offense' of which the defendant has been convicted.... [The

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[8] Doherty mischaracterizes *Dickerson* as holding that even under the amended VWPA and MVRA, defendants "cannot be compelled to pay restitution for conduct committed outside ... the ... conspiracy ... underlying the offense of conviction." Opp. 21. But he neglects to mention that this was merely an attempt to place a limiting gloss on *U.S. v. Hughey*, 147 F.3d 423 (5th Cir. 1998) ("*Hughey II*") and *U.S. v. Akande*, 200 F.3d 136 (3d Cir. 1999), cases on the opposite side of the circuit split.

[9] Admittedly, *Hensley* and *Henoud* also contain contrary language. *See* Opp. 26-28. But this intra-circuit – indeed, intra-*case* – confusion only punctuates the need for this Court to step in and clarify the law.

'conspiracy'] must be an 'element' of that 'offense' ... for ... conduct in the course of the ... conspiracy" to sustain a restitution award); *Akande*, 200 F.3d at 141 ("triggering event" and "boundaries of [] restitution[]" remain the "offense of conviction"); *Hughey II*, 147 F.3d at 437-38 (*Hughey* still restricts restitution to limits of conduct supporting offense of conviction). A starker and riper conflict is hard to imagine.

In contending otherwise, Doherty mischaracterizes his scheme to defraud the Union of required benefit contributions as "separate and distinct" from his money laundering conspiracy offense of conviction. Opp. 3, 7, 21-22, 29, 31. That is a fiction. In fact, as Doherty himself concedes (*id.* 3-4), he admitted in his sworn allocution that filching the Union was a primary object of the conspiracy to which he pleaded guilty: "[T]his was done by me [the check cashing money laundering scheme] for purposes of paying certain employees in cash" to avoid "union membership and other benefit[contributions] which the amount of their earnings would [otherwise] require," Pet. App. 123a, 126a. *See U.S. v. MacPherson*, 2009 WL 5125488, at *7 (2d Cir. Dec. 30, 2009) (Newman, J., concurring) ("A plea colloquy can be examined to determine a defendant's understanding of a plea agreement.").

To the extent the lower courts disagreed (Opp. i, 2, 7, 18, 22, 30),[10] they relied on the fallacy that restitution is limited to harm from conduct comprising the conspiracy element of the offense of conviction, as opposed to related, uncharged acts by the defendant in the course of the conspiracy. Doherty's contrary claim merely perpetuates that fallacy in this Court. But again, he cannot defeat the Union's petition by begging the question presented.

At bottom, Doherty's position raises a predominately factual dispute: was the conduct at issue closely related to, or separate and distinct from, the money laundering conspiracy for which he was charged and convicted? And in the first instance, that dispute is properly resolved by the lower courts on remand, under the appropriate legal standard as this Court determines it.[11]

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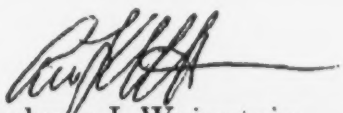
[10] *But see Local # 46*, 568 F.3d at 86 (Union "admittedly" harmed by common "plan" involving charged money laundering conspiracy).

[11] Contrary to Doherty's half-hearted suggestion (Opp. 19 n.4), the Union's second question presented is fully preserved for this Court's review. While the Union did urge below that it was a "victim[] of Doherty's [charged] money laundering conspiracy" (Opp. 19 n.4), it pointed the lower courts to MVRA § 3663(A)(2)'s broader "victim" definition in conspiracy cases – the correct legal standard – and the Second Circuit addressed the issue in depth. *See* 568 F.3d 85-88. Regardless, as the statute's name implies, a properly calculated restitution award under the MVRA is mandatory and unwaivable as a matter of law, whatever (continued...)

## CONCLUSION

Certiorari should be granted.

Respectfully submitted,



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[11](...continued)
arguments the parties might make – indeed, "even if the[] victims decline" restitution altogether. *U.S. v. Johnson*, 378 F.3d 230, 244 (2d Cir. 2004); *see also* Pet. App. 43a ("The Court cannot ignore the requirements of the [MVRA] just because a party has not raised them.").

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